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No. 08-5721

In The
Supreme Court of the United States

STEVEN SPEARS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

REPLY BRIEF FOR PETITIONER SEEKING WRIT OF CERTIORARI

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Argument in Reply

I. The Opinion Below Properly Presents the Question of Whether or Not a District Court May Categorically Reject the Sentencing Guideline for Crack Cocaine as Too Harsh.

All three of the opinions of the *en banc* Eighth Circuit below (Judge Riley's opinion for five judges, Judge Murphy's opinion concurring with Judge Riley, and Judge Colloton's dissent on behalf of five judges) insist that this case turns on the question of whether or not a sentencing court may categorically reject a sentencing guideline. Despite this, the government reads the opinions below to instead address a failure by the trial court to consider the 18 U.S.C. § 3553(a) sentencing factors at all, constituting procedural error.

The government's strained reading misconstrues those opinions in three ways. First, all three opinions plainly focus on the sentencing judge's categorical rejection of a guideline rather than procedural error. Second, to the extent that the opinion of Judge Riley may imply a failure to consider § 3553(a) factors, the implication is not that the district court failed to consider the § 3553(a) factors at all, but that the sentencing judge should have considered them a *second* time in order to come up with a particularized circumstance to justify the use of an alternative ratio for powder/crack cocaine sentences (and thus avoid the categorical use of an alternative ratio). Third, the record shows that, at any rate, proper procedure was followed in the district court.

A. Judge Riley's and Judge Murphy's opinions turned on the question of categorical rejection of the guidelines, not sentencing procedure.

Judge Riley's opinion makes clear what the ruling is about -- replacing the 100:1 ratio between powder and crack cocaine with an alternate, categorically-applied ratio in the absence of mitigating facts. The language of Judge Riley's opinion reflects this focus on what he sees as the need to base an alternate ratio on individualized facts rather than applying such alternate ratios categorically:

> The district court therefore 'impermissibly varied by *replacing* the 100:1 quantity ratio inherent in the advisory guideline range with a 20:1 quantity ratio.' [quoting *Spears I*] Additionally, 'the district court did not vary from the advisory Guidelines range based on an individualized, case-specific evaluation of the facts or of the defendant.' [quoting *Spears I*] In considering the overall goals of sentencing under § 3553(a) and conducting an *individualized assessment* based upon the particular circumstances of a defendant's case, a district court may determine the 100:1 quantity ratio results in a harsher sentence than necessary. However, the district court may not categorically reject the ratio set forth by the Guidelines.
>
> This determination is directly in line with the Third Circuit's reasoning in *Gunter*, where the court explained, 'we do not suggest (or even hint) that the Court *categorically reject* the 100:1 ratio and *substitute its own*, as this is *verboten*.' Nothing in *Kimbrough* suggests the district court may substitute its own ratio for the ratio set forth in the Guidelines. *United States v. Spears*, 533 F.3d 715, 717 (2008) (citations omitted, emphasis original to *Spears II*).

By quoting extensively from *Spears I* and specifically placing emphasis where he did, Judge Riley is straightforwardly stating the problem in this case is (for him) replacing the guideline ratio with another ratio as a *categorical* matter. Had he chosen to make this a case about procedure, one would have expected him to be much clearer in doing so.

Similarly, the opinion by Judge Murphy which gave a majority in favor of reversal also focuses intently on the issue of the categorical rejection of a guideline, and her opinion does not even imply that there was a procedural problem of any kind. The heart of her opinion asserts that "[r]ather than suggesting that a sentencing judge may develop his or her own policy ratio for the range of cocaine cases as the dissent proposes, in *Kimbrough* the Court approved a sentencing approach based on the "particular circumstances" of the defendant's case." *Spears II*, 533 F.3d at 718. Like Judge Riley, Judge Murphy would require a finding which identifies a "particular circumstance" if a guideline is to be rejected, and it is this conclusion, common to both opinions, which the Petitioner argues is contrary to *Booker* and *Kimbrough*.[1] This case squarely presents that issue.

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[1] Apart from its independent significance as a sixth and deciding vote, Judge Murphy's concurring opinion reflects how she reads the Riley opinion -- that is, as one that is about categorical rejection of a guideline, not procedure.

B. Any implication of procedural error involves the failure to examine the § 3553(a) factors a second time in order to justify an alternate powder/crack ratio on particularized circumstances.

At most, the Riley opinion *implies* a procedural error by quoting the following statement from the district judge at the sentencing hearing: "Once I made the decision I was going to vary on the crack ratio basis, I didn't really look at the other § 3553(a) factors because to me it was a moot question. I'll only look at that issue should this sentence be reversed on the 20-to-1 ratio." *Spears II*, 533 F.3d at 717 (citations omitted). Viewed in context, the sentencing judge was simply noting the fact that there was no need to consider additional mitigating factors at that time, because he was already running up against the statutory minimum by employing the 20-to-1 ratio.

In quoting this passage, the Riley opinion seems to want to call attention to the fact that the district court did not consider other § 3553(a) factors *specifically to justify the 20:1 ratio*. This is consistent with the Riley opinion's theme, asserting that individualized factors are needed to justify an alternative ratio. The procedure Judge Riley implies would apply only where an alternate ratio is used—that is, even if a judge has already considered the § 3553(a) factors (as the judge did here), he must consider them again directly in conjunction with the use of an alternate ratio. The short introduction Judge Riley inserted before quoting the district court -- "Rather, the district court substituted its own ratio, and did not

consider any *additional* analysis under § 3553(a)," *Spears II*, 533 F.3d at 717 (emphasis added) -- does not assert that no analysis of the § 3553(a) factors was undertaken. Thus, Judge Riley was not alleging that the district court failed to conduct any analysis under § 3553(a), as the government contends -- rather, he was implying that the district court should have undertaken *additional* analysis of those factors in order to justify the 20:1 ratio, which is simply consistent with the rest of the opinion's language which also argues that an alternative ratio is allowable only in relation to specific facts, not categorically. Requiring such additional analysis is not only consistent with, but *necessary to* the position that a new ratio can only be justified through individualized factors -- such analysis would be the only way such a variance could ever be justified. Only by looking at that introduction in isolation is the government able to create the misleading idea that the Riley opinion turned on a failure at sentencing to consider § 3553(a) factors at all.

C. The district court followed proper sentencing procedure.

Because it is focused on the idea of categorical rejection of a guideline, the Riley opinion does not meaningfully examine the procedure below after implying that additional analysis of specific individualized factors is necessary to justify the rejection of a guideline. Instead, that opinion moves on to a much more extensive analysis of categorical rejection of the 100:1 ratio.

Had the Riley opinion truly concerned itself with procedure and engaged in a further analysis, that analysis would have revealed two important factors which together show a reasonable procedure: First, the district court, at the time it employed the 20-to-1 ratio, had already considered (and acted upon) the § 3553(a) factors. Second, in saying that it "didn't really look at the other § 3553(a) factors because to me it was a moot question," the district court was obviously referring to "other § 3553(a) factors" which might drive the sentence downward, all of which were moot at that time because the sentence (after application of the 20:1 ratio) was already at the statutory minimum and could go no lower.

This court has described proper sentencing procedure as involving three steps: a proper calculation of the guideline range, consideration of the § 3553(a) factors, and proper explanation of the resulting sentence. *Gall v. United States*, 128 S. Ct. 586, 596-597 (2007). Here, the government attacks the second step, as employed in this case. This attack is unwarranted. In pondering the case at the sentencing hearing, the words of the sentencing judge reflect a fair consideration of the § 3553(a) factors. First, the district court affirmatively found that the criminal history was under-represented, a factor described in § 3553(a)(1) ("the history and characteristics of the defendant"). (Tr. at 20; Ex. 4 to Petition) After that point, the court declined at that time to vary for particularized reasons, saying, "I don't think there are other factors under § 3553(a) that in my view justify a variance . . .

I've read the brief and am familiar with the file." (Tr. at 26; Ex. 4 to Petiton) Certainly, this reflects a court that has properly considered the § 3553(a) factors.

Having done so, the sentencing judge (in the portion of the transcript quoted by Judge Riley and relied upon by the government) acknowledged that a further consideration of mitigating § 3553(a) factors is moot, because the court had run up against the statutory minimum simply by employing the 20:1 ratio. (Tr. at 28; Ex. 4 to Petition) Further adjustment through mitigation was not possible. The government believes that this acknowledgement that a floor had been hit somehow creates procedural error, but such a position makes no sense. Here, the district court calculated a guideline range, considered the § 3553(a) factors, and substantiated the sentence chosen. Thus no procedural error occurred. Instead, we are left with the question of the categorical rejection of guidelines, an important issue that this Court should resolve.

II. The Question of Procedure Was Never Before the Eighth Circuit.

The government waived objection to any procedural problems by failing to object at the sentencing hearing and by failing to raise the issue before the Eighth Circuit. At the conclusion of the sentencing hearing, the district court judge asked "is that a good-enough record you think that we've made?" After the defense attorney replied in the affirmative, the judge asked the prosecutor, "Anything else you'd like to add, Mr. Wehde, on this issue?" The prosecutor's response was "No,

your honor." (Tr. at 29; Ex. 4 to Petition) Thus, any procedural error was not properly before the Circuit Court for anything but plain error, and Judge Riley's opinion certainly does not address an occurrence of plain error, a discussion which would be necessary if the decision below turned on a question of procedure.

Second, even if the issue had been preserved, the government never chose to put the question of procedure before the Eighth Circuit. In this case's initial appearance before the Eighth Circuit, the government's cross-appeal challenged "the district court's categorical rejection of the Guidelines' 100:1 powder cocaine to crack cocaine quantity ratio and grant of a downward variance using a 20:1 quantity ratio." *Spears I*, 469 F. 3d at 1170. Before the case was reconsidered by the Eighth Circuit on remand, the government chose not to file additional briefing, and thus waived the issue a second time. (*See* Docket Sheet attached as Exhibit 1) Having chosen not to put the question of procedure before the district court or the Eighth Circuit, the government should not be allowed to do so now.

III. The Judgment is Not Interlocutory.

The judgment of the district court is not interlocutory. After the district court rendered its *final* judgment, the government noticed its cross-appeal. In *Spears I*, the Eighth Circuit *affirmed* the conviction but remanded the case for resentencing -- a posture identical to the current posture in *Spears II*. In response to the petition in *Spears I*, the government argued, as it does here, that the decision

of the district court was interlocutory and thus was not a proper candidate for review.[2] (*See the government's* response in *Spears ISpears I*at p. 5) However, the judgment of the district court was final and appealable. Indeed, the government itself filed an appeal based on the judgment -- an act that would not have been possible had the judgment been interlocutory. *See* 28 U.S.C. § 1291 (courts of appeals have "jurisdiction from appeals from all final decisions"). Further supporting the finality of the judgment, this Court granted Mr. Spears' petition despite the government's insistence that the judgment was interlocutory. And now, the same final judgment is before this Court after again being reversed by the Eighth Circuit. The judgment of the district court was final in *Spears I* and is, likewise, final in this case.[3]

Denying the petition will not promote judicial efficiency or doctrinal clarity. If the case is remanded for resentencing the government will almost certainly insist

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[2] Notably, the government's boilerplate argument ignores recent cases that came before the Court under almost identical circumstances. *See e.g., Claiborne v. United States*, 127 S. Ct. 738 (2006) (granting review of an appeal reversing and remanding a case to the district court for resentencing).

[3] Even if, as the government suggests, the decision below was interlocutory, which it is not, this Court has granted review of interlocutory decisions in criminal cases. *Solorio v. United States*, 483 U.S. 435 (1987); *Bates v. United States*, 522 U.S. 23 (1997). Furthermore, the cases the government cites fall into two distinguishable categories. The first category includes cases seeking review of an appeal from a trial order before final judgment. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251 (1916); *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R.*, 389 U.S. 327 (1967); *American Constr. Co. v. Jacksonville Ry.*, 148 U.S. 372 (1893). The second category is comprised of a single case where the petitioner sought review of a *vacated* final order. *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993).

on a longer sentence for Mr. Spears. If the district court agrees with the government in light of *Spears II*, a duplicate appellate process would begin anew. Moreover, denying this petition will leave the erroneous *Spears II* opinion on the books -- an opinion that improperly applies this Court's precedent and conflicts with the law of other circuits. Thus, contrary to the government's contentions, denying the petition will unnecessarily create confusion and unnecessarily consume judicial resources around the country.

IV. *Spears II* Remains the Law in the Eighth Circuit.

The government cites an Eighth Circuit *panel* opinion, *United States v. Davis*, 538 F.3d 914 (8th Cir. 2008), to imply that the Eighth Circuit has somehow overruled, in part, the erroneous decision in *Spears II*. (Resp. at 14) But *Davis*, a *panel* decision, cannot overrule *Spears II*, an *en banc* decision. *See Three Buoys Houseboat Vacations U.S.A. Ltd. v. Morts*, 921 F.2d 775, 779 n.5 (8th Cir. 1990) (noting that a panel opinion cannot even overrule another panel opinion without approval by the en banc court); *Zeneca Ltd. v. Mylan Pharms., Inc.*, 173 F.3d 829, 831 (Fed. Cir. 1999) (observing that multiple federal courts have noted that a panel opinion cannot overrule an en banc opinion). Thus, to the extent there is any conflict between *Davis* and *Spears II*, *Spears II* controls.

Moreover, *Davis* is distinguishable from *Spears II* and any statement in *Davis* that a district court may vary in a "mine run" case is dicta. Indeed, the *Davis*

panel observed that the district court found individualized, case specific facts that mitigated the defendant's sentence -- these findings make *Davis* anything but "mine run." *Davis*, 538 F.3d at 918. The government's response conspicuously omits that the *Davis* panel considered the district court's examination of the other § 3553(a) factors and found that Mr. Davis was admitted to Iowa State University, had the ability to better himself and become a productive member of society, and that pretrial services found him to be cooperative. *Id.* at 918-19. Thus, the question in *Davis*, where the sentence was based, in part, on individualized circumstances, is distinct from the question presented in *Spears II* -- a case where the district court varied based solely on a disagreement with the 100:1 ratio. Thus, beyond the fact that the *Davis* panel opinion could not overrule *Spears II* as a matter of law, the two opinions do not address the same question or occur against a similar factual backdrop.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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